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In the Matter of:)	
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Implementation of Pay Telephone)	
Reclassification and Compensation)	CC Docket No. 96-128
Provisions of the Telecommunications)	
Act of 1996)	
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Implementation of Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

CC Docket No. 96-128

**NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES
COMMENTS IN OPPOSITION TO
PETITION FOR RULEMAKING FILED REGARDING ISSUES
RELATED TO INMATE CALLING SERVICES
*“Wright Petition”***

The New York State Department of Correctional Services (DOCS) submits these comments in opposition to the *Wright Petition*. The Commission should deny the request to initiate a notice and comment rulemaking proceeding to consider precluding exclusive service arrangements and to possibly impose additional restrictions on the provision of inmate telephone service. Although the Petitioners state that the scope of the *Wright Petition* is limited to inmate telephone services at private prison facilities, they acknowledge that the adoption of such rules by the Commission would likely preempt state laws and regulations governing the administration of both State Correctional Facilities and publicly administered local correctional facilities.¹ Furthermore, the contracts for such services are awarded by the state and local agencies pursuant to the applicable procurement laws, New York State Finance Law sections 160, et seq. Any such regulatory action would preempt state law with respect to contracting for such services. In addition, the Petitioners seek to limit commissions available under such contract. It is the

¹ *Wright Petition* at Page 4, footnote 4.

responsibility of the Legislature to determine how such funds will be allocated for the benefit of the inmate population in the State of New York. Any regulatory action by the Commission in this area will directly interfere with the State Legislature's budgetary process.

The Commission is being asked to initiate a rulemaking proceeding to consider imposing restrictions on how inmate calling services are offered by carriers providing such services. However, to do so the Commission must set aside contracts entered into in compliance with state procurement laws and dictate to the State Legislature how to pay for state expenditures. The Commission should not preempt these important state functions.

More importantly, the Commission is being asked to substitute its judgment for that of prison administrators as to how to appropriately manage prison systems and to ensure appropriate levels of security at every prison and jail throughout the nation. The Commission should decline the invitation to determine how prison administrators should meet legitimate security and other penological needs while affording inmate telephone service.

I. DOCS INMATE CALL HOME PROGRAM

A. The New York State Department of Correctional Services and its Inmate Telephone System.

DOCS is the state agency charged with the responsibility of confining all persons convicted of a felony and sentenced to imprisonment in New York State. DOCS operates 71 correctional facilities throughout the State of New York including the Willard Drug Treatment Campus. DOCS presently houses approximately 65,000 inmates. These facilities vary in size, structure and purpose. DOCS operates one Drug Treatment campus, three correctional camps, several work release facilities, and a number of minimum, medium and maximum security

facilities. The smallest facility currently has 86 inmates under custody while 2,895 inmates are in the largest facility.²

Although there is no constitutional right for an inmate to have unlimited access to telephone communications with family and friends, DOCS established the Inmate Call Home Program as one of several available methods for inmates to maintain contact with their loved ones. DOCS, through its contract with MCI, operates a number of inmate telephones providing a means for inmates to communicate with their friends and families by placing collect calls to pre-approved telephone numbers. All self-dialed inmate telephone calls from DOCS' facilities are handled by the Inmate Call Home Program. DOCS' regulations regarding the Inmate Call Home Program are set forth in the Official Compilation of Codes, Rules and Regulations of the State of New York at Title 7 NYCRR Part 723. The Inmate Call Home Program operates in each of the above-described facilities.

The telephone system itself consists of some 3,335 collect call-only telephones, some 150 high capacity T-1 facilities dedicated to inmate telephone traffic, and a call registry including 1,331,674 telephone numbers. About one-third of the numbers on the call registry are presently active.³ DOCS' inmates complete approximately 500,000 calls per month with an average length of 19 minutes, totaling roughly 9.5 million minutes.⁴ In addition, DOCS' inmates attempt approximately 2 million additional calls each month that are not completed. For each non-completed call, the inmate is advised of the reason for the denial by a voice response system. The call record is also marked with the call denial reason. DOCS' counselors have access to these call records to assist the inmate with any concerns.⁵

² See Affidavit of Robert E. Koberger (Koberger Aff.), ¶ 3.

³ Koberger aff., ¶ 9.

⁴ Id.

⁵ Id.

DOCS' inmates completed 6,706,916 calls during 2003. Of those completed calls, 13% were interstate calls. The overwhelming majority of calls, 87%, were intrastate local and long distance calls terminating inside New York State.⁶

B. Limitations on Telephone Access Under the Inmate Call Home Program.

The benefits of providing such a system must be balanced with the risks of giving inmates access to instantaneous communications with the outside world. Accordingly, DOCS has implemented a number of limitations associated with the Inmate Call Home Program. All inmate self-dialed calls are outgoing collect calls only and no credit card nor incoming calls are permitted. *See* 7 NYCRR § 723.5(a). Each inmate is allowed a maximum of 15 active phone numbers on his or her telephone list. *See* 7 NYCRR §§ 723.2(a), 723.5(c). All calls are subject to monitoring. 7 NYCRR 723.3(c). Furthermore, any individual's number may be blocked for a variety of reasons. *See* 7 NYCRR 723.3(d). Otherwise, broad categories of calls are simply prohibited based on either the status of the called person or the method of placing the call. 7 NYCRR § 723.3(e) (amended effective January 7, 2004). Included in the types of calls DOCS prohibits are the placing of calls to operator information; placing calls to unrelated minors under 18 years of age; all calls which utilize any means of call forwarding or third-party calling; and the placing of calls to wireless communication devices unless specifically authorized for an emergency telephone call. Such calls are prohibited for valid security reasons including but not limited to DOCS' concern that an inmate may utilize the inmate telephone system to harass a crime victim or witness, or that calls placed via call forwarding, third-party calling or to a wireless phone may be used by an inmate to direct the commission of a crime from prison, and also may assist the inmate in avoiding detection of that criminal act.

⁶ Koberger aff., ¶ 10.

C. The Inmate Call Home Program Contract.

The contract for the provision of telephone service for the Inmate Call Home Program is currently held by MCI. MCI's current contract with DOCS began on April 1, 2001 and expires March 31, 2006, with the possibility of two one-year extensions. Under the contract, MCI is the exclusive provider of inmate phone service to all state correctional facilities in New York.

MCI's contract with DOCS sets forth the terms and conditions under which MCI will provide inmate calling services to all correctional facilities in New York consistent with the above-referenced regulations. Under the terms of the contract, MCI provides collect calling to inmates of the correctional facilities, and provides DOCS with the security features referenced above, as well as a number of associated security features. The telephone system is programmed by date and time to turn on and off; limit inmate calls to a specific length; limit the number of refused calls by an inmate to any single recipient; and to restrict certain classes of services (such as 800 or 900 calls). DOCS also requires MCI to provide monitoring and recording capability, including all equipment necessary to perform these functions. Finally, the rates charged for such calls are capped under the contract, and the provider must file all appropriate tariffs with the State Public Service Commission.⁷

DOCS receives a 57.5% commission from MCI. The revenue from this commission is deposited into an Inmate Benefit Fund, which was created by the New York State Legislature in 1987 as part of the state budget process. While some of the commission revenue is used to pay for annual operation and maintenance expenses associated with the Inmate Call Home Program, the remainder of the funds pay for a number of benefits for the inmate population including cable

⁷ The contract was recently amended and a new tariff was filed by MCI implementing a new, flat-rate structure for all inmate calls placed on the Inmate Call Home Program. The PSC issued its determination finding that the rates were just and reasonable on October 30, 2003. PSC Case No. 03-C-1058.

television service in a number of facilities without adequate television reception; free bus service for visitors from New York City and several upstate cities; expenses associated with DOCS' Family Reunion Program which allows relatives to spend two days with the inmate inside a secure perimeter; nursery and family development programs at two facilities housing female offenders; a medical parole program; and a number of infectious disease control programs including funding of an AIDS Institute, AIDS pharmaceuticals, staff training and related programs.⁸

The Petitioners' assertion that commission payments are used "as a general slush fund" is simply baseless.⁹ The use of the commission payments is approved by the State Legislature through the annual budget process, and every dollar is allocated to certain authorized purposes that are intended to benefit the inmate population.

II. THE COMMISSION SHOULD NOT PREEMPT THE DECISION MAKING AUTHORITY OF PRISON ADMINISTRATORS WITH RESPECT TO LEGITIMATE SECURITY NEEDS

When the Commission first addressed this issue it determined that "the definition of 'aggregator' does not apply to correctional institutions in situations in which they provide inmate-only phones... [because] the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from the regulation being considered" in that proceeding. In the Matter of Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd. 2744, ¶ 15 (1991). This conclusion was affirmed by the Commission in 1996. In the Matter of Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, 11 FCC Rcd. 4532, 4547 (1996). Thus, while the Commission has expressed a

⁸ See "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," New York State Department of Correctional Services (August 2003), annexed hereto as Exhibit A, page 4.

⁹ *Wright Petition* at pp 21-22.

concern with the rates charged by some providers, the Commission has consistently held that due to the unique set of circumstances that exist within the prison environment, the regulations that apply to public payphones do not apply to inmate-only telephones.

Similarly, the United States Supreme Court has recognized that “running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources” in cautioning the federal courts to exercise restraint in supervising the minutiae of prison life should also be considered by the Commission. Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Because of the complex nature of running a prison, and due to the expertise required to do so, the Supreme Court has warned the federal courts to afford deference to the appropriate prison authorities. Id.

For the same reason, the Commission should recognize that operating an inmate telephone system requires penological expertise not associated with any other type of telephone service. The Commission should show appropriate deference to the determinations of prison administrators about how to satisfy both the desire to provide inmate telephone service and the need to implement appropriate security measures for such service.

**III. THE MULTIPLE IXC ENVIRONMENT
SUGGESTED BY PETITIONERS’ EXPERT
PRESENTS MANY OF THE SHORTCOMINGS
DOCS SEEKS TO AVOID BY USING A
SINGLE PROVIDER**

Petitioners rely heavily upon the opinions of Douglas A. Dawson to support their petition. Mr. Dawson is the president of a communications consulting firm.¹⁰ While he states that he has experience and expertise relevant to the issues of this proceeding, and he implies that he has specific experience with the provision of long distance calling for prison inmates, he does not

¹⁰ Affidavit of Douglas A. Dawson (Dawson Affidavit) at ¶ 1.

claim to have ever worked in a correctional system.¹¹ Many shortcomings of Dawson's hypothetical system become apparent when examined with respect to a prison system like that in New York State. Dawson envisions an inmate calling system where a number of IXC's establish service and compete for the business of the inmates and/or their families. This seems to make sense when taken from the perspective of a single prison with over 1,700 inmates. In the DOCS' system, however, this business model simply falls apart.

First, there is little chance that even one IXC is going to compete for the business of the inmates at DOCS' work release and other small facilities with very little telephone traffic. Those inmates could be left with no service whatsoever. Inmates at larger facilities would likely have more choices than inmates at smaller facilities. This could result in telephone calls from one facility costing substantially more than telephone calls from a facility that is less than one mile away.

Inmates committed to serve a sentence of imprisonment in DOCS may be transferred to any of its facilities.¹² Transfers occur frequently during a period of incarceration based on changing security classification levels, programming needs, discipline, and a number of other factors. Because DOCS' facilities are so different, the cost of placing a telephone call could easily change with a transfer. Furthermore, assuming that the inmate's family member has established a prepaid account with an IXC offering service at one facility, that family member would not be able to use that prepaid account if the inmate is transferred to a facility where the particular IXC is not an option. This raises a number of administrative issues, and associated costs. It may also mean that an inmate would be prevented from calling a family member simply because he was transferred.

¹¹ Dawson Affidavit at ¶ 2.

¹² New York Correction Law § 23.

Under DOCS' single provider system, an inmate's approved telephone number list and PIN are only active at the facility where the inmate is housed. That list is automatically transferred to the receiving facility with the inmate and is usable at any prison location that the inmate is transferred to. At the same time, the inmate's PIN is deactivated at the sending facility. Under Dawson's theory, if the family establishes the debit account and the inmate is transferred to a facility where the particular IXC is not an option, that family could not use that prepaid account. Under Dawson's alternative theory where the inmate is permitted to select the IXC, even more complications are presented. In addition to moving the approved telephone number list and authorized facility for the PIN, the inmate would need to be provided with a facility specific menu of available IXC's. Based on which IXC's are available at the facility, adjustments will be required each time the inmate moves. This would be a staff intensive endeavor and would certainly present an additional financial burden for the State.

A. Petitioners Have Misconstrued the Complex Security Issues Associated With Operating an Inmate Calling System.

The suggestion that further restrictions such as limiting debit fund payments to a small list of outside parties could prevent the creation of a commodity demonstrates a fundamental misunderstanding of prison society.¹³ Dawson states that "it should also be kept in mind that a collect calling system can be abused as much as a debit calling system. Whatever value can be extorted from another inmate's debit account could also be extorted from his collect calling PIN." Dawson is simply wrong. DOCS prohibits inmates from possessing money. In a system where the inmate has a debit card, that inmate has money and that inmate can pay for someone else's calls. For example, through violence or threat of violence, one inmate can force a second inmate to add a telephone number to his list of approved numbers. Thereafter, the first inmate

¹³ Dawson Affidavit ¶ 37.

can place calls to his desired call recipient using that second inmate's PIN and debit account at the expense of the second inmate. With collect calling, there is no financial motive for such extortion because the called party pays for the call no matter whose PIN is used. Similarly, one inmate could voluntarily pay for a second inmate's calls to purchase drugs or other contraband from that inmate.

Dawson also suggests that the creation of a commodity through debit calling can be avoided if techniques for limiting the calling for each inmate "is combined with the inability to re-originate calls."¹⁴ However, he does not explain how DOCS can prevent the re-origination of calls through the use of a platform. He also fails to explain how DOCS can force an IXC with no contractual relationship with DOCS to impose restrictions on the re-origination of calls.

B. Implementation of a Debit System will Increase Cost and Result in Less Money Being Available to the Inmate for Telephone Calls.

In any event, DOCS has identified a number of issues associated with operating a debit account system for the inmate. First, the administration of a debit system would greatly increase the cost of administering the Inmate Call Home Program, and in particular DOCS' Inmate Accounts system. As required by New York Correction Law sections 112 and 116, DOCS has established facility accounts for the deposit of inmate funds. Accordingly, DOCS has established a system for the control of such inmate accounts and for the collection and repayment of inmate advances and obligations.

The State Legislature has created a whole host of fiscal penalties that can be imposed on an inmate as part of a criminal sentence following the conviction of a crime. These monetary penalties can be imposed together with sentences of imprisonment and include such things as mandatory surcharges, fines, restitution, reparation and a crime victims assistance fee. From a

¹⁴ Dawson Affidavit ¶ 37.

literal wording of various provisions from the relevant statutes, it is clear that the Legislature expects the involved state officials, in particular DOCS' officials, to take any and all reasonable steps to effectuate collection of outstanding obligations.

As a result of these and a number of other statutory changes, DOCS initiated policies regarding the collection of restitution. Furthermore, separate and aside from the issue of restitution, DOCS has also expended a considerable amount of time, effort and resources carefully developing protocols by which the filing fee provisions of the Prison Litigation Reform Act (PLRA) would be implemented. These efforts included extensive collaboration with the Chief Clerk of the Second Circuit Court of Appeals in order to ensure that the filing fees would ultimately be fully collected.

The State courts also recently followed the Federal courts by instituting a new filing fee system. As such, DOCS has established a protocol for the collection and payment of State court filing fees. The implementation of procedures to collect both Federal and State court filing fees has again increased the work load of business office staff.

In addition to the issue of filing fees and sentence-related penalties such as restitution, there are other types of monetary penalties that may be imposed upon an inmate during his incarceration with DOCS such as a disciplinary surcharge for a violation of the standards of inmate behavior. A disciplinary hearing officer can also impose restitution as a penalty upon an inmate who was found guilty of having destroyed state property.

In keeping with the aforementioned practices, an individual sending money to an inmate cannot earmark those funds for a particular use. DOCS cannot and will not change that restriction to fund a telephone debit account. Any funds deposited for the inmate must go into the inmate's facility account where, in accordance with established protocols, a portion of the

deposit (up to 100% in some instances) will be applied to any outstanding liens and encumbrances in accordance with DOCS' policies before the remainder of those funds become available to the inmate.

Instituting a debit based system would further increase the duties of the business office personnel by requiring the processing of additional deposits and disbursements from inmate accounts. For the foregoing reasons which include ensuring that the inmate cannot avoid paying legal obligations, any money the inmate or his family wished to put into a debit account would first need to be deposited into the inmate account. As a result, DOCS would incur substantial increase in volume of deposits, and this would in turn increase the costs in the administration of the inmate accounts system. Additional staff would likely need to be added to every facility and Central Office to absorb the increased work load if a debit system were established.

The adoption of a debit based inmate phone system would greatly increase the administrative cost to DOCS of running the phone system, and in particular of addressing the increased work load through the inmate accounts offices.

**IV. THE COMMISSION SHOULD NOT CONSIDER
PRECLUDING EXCLUSIVE INMATE CALLING
SERVICE AGREEMENTS BECAUSE DOING SO
WOULD BE AT THE EXPENSE OF
PUBLIC SAFETY**

The heart of Petitioners' request is that the Commission initiate a rulemaking proceeding to consider precluding exclusive inmate calling service agreements. DOCS' submits that the Commission should not consider the request because any regulatory structure precluding a single carrier system would greatly impair the prison administration's ability to meet its security needs.

The single provider component of DOCS' Inmate Call Home Program inmate telephone system is perhaps the most important component in ensuring that DOCS' quality of service and

security needs are met. While the petition and the Dawson affidavit address the technological feasibility of building the security features into a single platform, the Petitioners and their expert ignore the realities of data sharing and personal responsibility. With a single provider system, when DOCS' has a problem with the system -- whether related to call completion, quality of service, billing or security matters -- DOCS is able to contact a representative of the service provider and resolve the issue. In a multiple IXC environment, no one service provider is responsible for any given issue.

First, with only a single provider, all data sharing occurs between DOCS' system administrators and the company. That company has contractual obligations to DOCS, and a seven million dollar performance bond to ensure that they comply with their obligations. When additional providers are added, the environment becomes much more complicated. It becomes more difficult to determine which provider is responsible for any given problem, and it becomes increasingly difficult to ensure that the data provided by each service provider to DOCS is reliable. With a single provider, there is no question where the problem is. When additional service providers are added, it will greatly increase the time it takes to determine who is responsible for the technological issue, or who has the information necessary to address the problem.

More importantly, DOCS' security and investigative personnel are able to contact the single provider to assist them in performing their security functions. On countless occasions, DOCS has needed to turn to MCI to obtain the information that was not readily apparent in the normal, day-to-day data sharing that occurs under the contract. This is only possible due to the single provider relationship. Staff are also often required to contact MCI to request that the carrier either block calls to a particular number, unblock calls to a number, help with the tracking

of call patterns, or to obtain call information such as BNA data. For example, in our present environment DOCS often relies upon information provided by MCI to determine the termination point of a telephone call when security issues require that we do so. In a multiple IXC environment, DOCS must first determine which IXC carried the call from the platform. Then, assuming that the IXC did not pass the call to another service provider, DOCS must attempt to obtain the termination point from that IXC. Such an environment may very well result in delays in DOCS getting access to critical, time-sensitive information, which could hamper DOCS ability to prevent the commission of a crime involving one of its inmates.

While the vast majority of inmate calls are legitimate, there are a number of inmates who use the telephone system to circumvent DOCS' regulations or to break the law. The Inmate Call Home Program has been used in the commission of a number of crimes. It has been used to arrange drug deals outside of prison, to coordinate the smuggling of drugs into prison, to arrange for murders and to intimidate witnesses. On many occasions, DOCS' investigative staff have been able to prevent the commission of crimes with the intelligence obtained over the inmate telephone system. While much of this intelligence information comes from the content of the conversation itself, having access to information concerning the details of the call from the service provider is essential. Without such information, DOCS' investigators cannot ascertain with certainty the identity of the called party. Such information is essential to prevent the commission of a planned crime, or to prosecute the inmate and his conspirators for a completed crime.

The Inmate Call Home Program has generated extensive intelligence regarding large-scale attempts to operate illegal narcotics distribution rings in the outside world. DOCS has worked closely with the Federal Drug Enforcement Administration to thwart such activities.

The Inmate Phone Home Program has also provided a means to investigate alleged murder threats made against members of the judiciary and prosecutors' offices. Threats that are made against crime victims can also be investigated under the Inmate Call Home Program. In addition, inappropriate relationships that occasionally develop between staff and inmates can be uncovered by intelligence generated from the inmate telephone system. The information generated has also directly led to the recapture of inmates who have escaped or absconded, including inmates who have fled to other states and even to other countries.

Most notably, audio tapes of calls placed by a former DOCS' inmate, Elsayid Nosair, helped federal prosecutors establish the link connecting him and others to the 1993 bombing of the World Trade Center.¹⁵ DOCS' Office of the Inspector General continues to use the resources available to it through the Inmate Call Home Program, often in conjunction with other law enforcement agencies, to discipline or prosecute inmates involved in ongoing criminal enterprises both within DOCS' correctional facilities and in the community. This ability has taken on even greater significance following the terrorist attacks of September 11, 2001.

The creation of a multiple IXC environment increases the ability of an inmate and his call recipient to engage in fraud. Even under the single provider system, inmates and their call recipients who are engaged in misconduct will often attempt to use fraud to hide their identity. This fraud may be as simple as an inmate providing a false name and address to associate with the telephone number, or may involve more sophisticated measures such as the use of third-party calling or remote call forwarding services to hide the true destination of the call.¹⁶

¹⁵ "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," Exhibit A, page 2.

¹⁶ While DOCS limits each inmate to 15 numbers on their approved telephone list and requires the inmate to provide the name and address associated with each number, DOCS is not able to investigate the accuracy of such information every time a new number is added. Thus, during the course of an investigation into some misconduct, DOCS investigators often discover for the first time that the information is false and must rely upon MCI to provide accurate information about the called party.

V. CONCLUSION

The United States Supreme Court has recognized that “running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources” in recognizing that the federal courts should exercise restraint in supervising the minutiae of prison life. Turner v. Safley, *supra*. The Commission should heed this warning and respect the determinations of prison administrators about how to satisfy both the desire to provide inmate telephone service and the need to implement appropriate security measures for such service.

In light of the limited access to telephone communications permitted to DOCS’ inmates under the applicable regulations, and because DOCS has significant security concerns with the circumvention of our integrated telephone system, the Commission should decline to issue any ruling on the *Wright Petition* that may preempt the State from determining the appropriate manner in which to provide inmate telephone service.

Respectfully submitted,



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EXHIBIT A

Inmate pay phone access fosters family ties, enhances security for all

Controls to protect public, commissions fuel long-distance debate on call system

No other program as much as this one seeks to balance the oftentimes competing and legitimate needs of inmates and their loved ones on one side, with prison security and the general public's concerns on the other.

At first blush, one would be hard pressed to identify the debate: since studies have shown maintenance of family ties reduces recidivism, it would seem allowing inmates such a privilege would benefit all New Yorkers. And the possibility of losing phone privileges would seem to aid in fostering positive inmate behavior and maintaining prison security.

But the debate flows from just those propositions:

- How far should the state go in its restrictions on the program, controls that are designed to enhance prison security and promote public safety?
- Should the state be charging commissions on the phone calls to at least partially offset the cost of other inmate programs that some say should be funded by all taxpayers through the state's budget?



A bank of inmate phones at Hudson with fence perimeter and razor wire in the background.

These are among the issues that have dogged the Inmate Call Home Program since its inception.

The intent here is to set out the state's position on the past and present of the program, and to explain a major policy and rate change in the program taking effect this month. The goal is to sort out these issues so that, regardless of one's position on the issue, readers are aware of the background and the state's position on the Inmate Call Home Program.

Up until the mid-1980s, each prison in the state negotiated its own contract with local telephone companies to provide collect call-only inmate phone service. The rates charged and program rules were as diverse as the system.

In 1985, the first call-home program was piloted at Sing Sing Correctional Facility. From that beginning grew today's system with uniform rates and program rules.

There are now 3,335 collect call-only telephones available to the state's 66,000 inmates in common areas in the 71 facilities operated by the Department of Correctional Services. Phones are operational from 7 a.m. to 11 p.m.

Approximately 500,000 inmate calls are now completed each month, totaling roughly 9.5 million minutes. Attempted calls that are not completed add in excess of 2 million phone uses per month.

There are those who surmise that the cost of those inmate telephone calls should be approximate to what New Yorkers pay when they pick up their telephones at home and dial a call.

But that residential customer is paying in the neighborhood of \$30 a month to the phone company for the privilege of having a phone, before even one call is made. Those basic charges include federal, state and local taxes and excise surcharges, line and equipment fees plus other costs.

For 66,909 inmates, those \$30 per month charges would total \$24 million annually – but inmates do not pay a penny in monthly charges to have phone service available to them.

The state realizes that its prison population includes violent and predatory felons, and those familiar with scamming the public and breaking laws in other ways.

Auditors OK phone contract, spending

An audit by the state Comptroller spanning five years and 35 million inmate calls found appropriate oversight of the Inmate Call Home Program as well as proper accounting for commissions totaling \$109 million received by the state during the period April 1, 1996 through March 31, 2001.

In its audit issued in July 2003, the Comptroller wrote: "The Department was required to deposit all program revenue in a designated state account. We determined that all of the revenue received during the five-year contract period was deposited in this account.

"Further, all expenditures from this account should relate to certain authorized purposes that are intended to benefit the inmates at the correctional facilities (such as inmate health care and family visiting programs). We examined a sample of \$502,688 in expenditures for a one-year period, and determined that all of the expenditures related to authorized purposes.

"We also determined that the expenditures were properly approved and adequately documented.

"We conclude that an appropriate degree of internal control is provided by these policies and procedures," auditors said of the contract with vendor MCI.

The Comptroller recommended an outside firm or some analytical measurement be employed to enhance checks on MCI's accounting, even though it found no fault in the Department's review of MCI's accounts. That additional check on MCI would cost \$150,000 annually, auditors said. ☎

The state must therefore have systems to safeguard the public against inmate misuse of the phone system. It must also have ways to prevent inmates from using phones to disrupt prison security by, for example, planning escapes.

Therefore, each inmate is assigned a Personal Identification Number and can register up to 15 telephone numbers at a time on that PIN. That allows the prison system to know which inmates are making calls and who they are calling.

Together, inmates have registered 1,331,674 telephone numbers, about one-third of which are active at this time.

PINS and phone registries are only the beginning of the system that the Department must have in place to safeguard the public and maintain prison security when inmates have access to telephones.

The past: developing a system to meet needs

The prison inmate telephone system, to ensure facility security and public safety includes:

- Multi-lingual operators to assist and communicate with inmates fluent in other than English.

- Implementation of call-blocking to ensure inmates are not making random calls to or harassing the general public, calling the victims of their crimes, unrelated minor children, witnesses who testified against inmates, prosecuting district attorneys, presiding judges or unincarcerated co-defendants.
- Automatic blocking of all 800 or 900 area code numbers.
- The playing of a pre-recorded message at the beginning of each call informing the recipient that the call is being placed from a prison, followed by calling inmates stating their name.
- Inmates may have criminal cohorts on the outside planning future crimes, so the Department needs to know to whom inmates are talking. Therefore, third party calling is strictly forbidden and, through staff monitoring as well as certain technology, the Department attempts to prevent all such calls.

Court upholds phone audio taping as a tool to detect inmate crimes

Elsayid Nosair provides the link federal prosecutors need to connect him and others to the 1993 bombing of the World Trade Center. Buffalo prosecutors prove that David “Sly” Green of the L.A. Boys is the mastermind behind a substantial criminal operation in the Erie County area. Suffolk County smashes a heroin packaging ring in Central Islip, leading to 20 arrests. Dutchess County connects two Mad Drama street gang members to an unsolved murder in Poughkeepsie. The Manhattan district attorney catches up with and convicts a suspect in a 12-year-old kidnap-murder.

All of these cases share two commonalities: key defendants were in prison at the time criminal investigations were underway. And audio tapes of inmate phone calls helped prosecutors to build their cases, conversations that included documentation on the originator and the name and location of the telephone call recipient(s).

The Department’s ability to document who is receiving inmate calls and the recipient’s location have often been crucial in detecting crimes committed in prison, and in protecting the public from crimes committed or being planned by inmates and outsiders.

While the lack of computerization would require a lengthy hand count of such cases made in past years by the Department, 2003’s computerization shows 250 cases in the first seven months of the year – cases being investigated by the Department or federal, state or local law enforcement agencies involving taped inmate conversations.

None of those investigatory costs are underwritten by the Inmate Call Home Program: all are paid directly by taxpayers. An argument could be made that law enforcement agen-

cies should be allowed to bill the program for prosecution of inmates who misuse the system in criminal enterprises.

Inmate Green complained that the taping of inmate phone calls violated his rights because it was done without a court order or his direct knowledge.

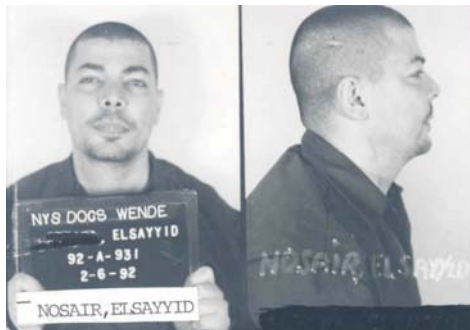
In rejecting his claim and upholding the Department’s policy, a federal appeals court noted there are notices in English and Spanish located in the area of all inmate phones. The notice reads: “All inmate telephone conversations are subject to electronic monitoring by Department personnel.”

It also threw out his contention that his knowledge of the potential for taping did not indicate his agreement:

“When an inmate has repeatedly received notice that calls placed on prison telephones are subject to surveillance,” the court reasoned, “the evidence indicates that he is aware of the monitoring program, and he nevertheless uses the telephones, by that use he impliedly consents to be monitored...”

The court was also unimpressed with his argument that the state went beyond monitoring when it taped his calls.

Said the court, “That is of no importance. Recording is simply one way of preserving the information gained from the electronic monitoring. The prison need no more have provided notice that it would record the intercepted conversations than that it might maintain shorthand notes. Moreover, the relevant New York state regulations provided public notice that the state recorded inmate telephone conversations.” ☎



- To monitor compliance with these legitimate security needs, inmates are warned via signs in English and Spanish that equipment has been installed and staff assigned to monitor calls that are tape recorded, stored and retrievable.

Besides these protections built into the prison phone system to safeguard the public, other controls are necessary in order to maintain safety and security in prison. The system must also provide for:

- The ability to flag and then disconnect any inappropriate PIN use or to hang up on the third party transfers.
- The ability to recall phone conversations for a period of time set by the Department.
- The ability to set time limits on inmate calls in order to maintain availability of phones to all inmates. The current limit is 30 minutes per call.
- The ability to transfer an inmate's phone registry and PIN to another prison as the inmate moves, and to terminate activity on that PIN and registry at the sending facility.
- A statewide system that allows it to be monitored from various locations. The system provides access to any inmate's phone records and to review suspect conversations.
- The ability to block any telephone number from being dialed at any individual prison or across the system.

No outside phone company charges residential customers for these controls because they are not required on those systems. As a result, phone charges under the Inmate Call Home Program are in part higher because of these stringent, state-of-the-art procedures necessary to safeguard the state's prisons and to protect the public from inmates who would misuse the system to commit crimes.

New York taxpayers directly finance some aspects of the phone program. Prison counselors, for example, maintain individual inmate call registries. If an inmate commits a disciplinary infraction, the Department's computer mainframe has been designed to automatically stop all telephone access by inmates who have lost this privilege as punishment for misbehavior. Phone use by the inmate cannot be restored unless or until the sanction period has been served or the mainframe has recorded a change in the punishment.

In the first seven months of this year, the Department has, on its own or in conjunction with other law enforcement agencies, participated in 250 investigations that, in part, relied upon the phone system to generate evidence or investigatory leads.

The present: preserving the system to protect the public

Under state law, every phone company has the right to compete on an equal footing for this contract, which by law is publicly advertised and competitive bids sought.

That competitive bidding process is reviewed and approved by the state Attorney General and then by the Office of the State Comptroller. Only then is the contract awarded, in this case to MCI. MCI is the nation's second-largest long-distance carrier

PSC details phone rate decision

In a December 7, 1998, recommendation by staff adopted by the state's Public Service Commission, staff outlined tariff revisions that were to be made in the Inmate Call Home Program. PSC Communications Division staff found:

"MCI's contract with DOCS sets forth the terms and conditions under which MCI will provide calling services to correctional facilities in New York for a three year period. DOCS has the right to renew the contract for two additional one year periods. Under the terms of the contract, MCI provides collect and person-to-person collect calling to inmates of the correctional facilities, and provides DOCS with a number of security features not traditionally associated with collect calling.

"MCI's systems can be programmed by date and time to turn on and off, limit inmate calls to a specific length, limit the number of calls and recipients of calls available to each inmate, and restrict certain classes of service (such as 800 or 900 calls). DOCS also requires MCI to provide monitoring and recording capability, including all equipment necessary to perform these functions. Because of these additional costs, MCI asks that its Maximum Security service be treated as a unique service not subject to the rate caps applicable to standard Alternate Operator Service.

"The service provided by MCI and DOCS is more than just the provision of collect call service. The service permits the selective blocking and passage of certain calls from the inmates, allows for the ability to monitor and record conversations, includes some 150 high capacity T-1 facilities to handle the traffic from 3500 phones, and provides for maintenance and repair of the telephones.

"We should also note that the FCC has elected to forbear from imposing rate caps or benchmarks on interstate calls from prisons. The FCC reasoned that the communications equipment employed for legitimate security reasons could result in higher rates on collect calls from inmates in prisons than the rates from ordinary locations." ☎

as well as the largest carrier of inmate phone programs. The system it put in place uses state-of-the-art equipment.

MCI bills customers for their calls, and pays the state a commission on them. Customers are not required to be MCI customers to receive telephone calls from inmates. They must however, either subscribe to a telephone company that will collect and forward charges to MCI, or else they must have a direct-payment arrangement with MCI.



Like any telephone company, MCI has the right to suspend or terminate service for nonpayment of bills.

MCI pays New York's taxpayers a commission rate equal to 57.5 percent of the gross profits on calls placed through its system.

While some states have contracts under which they receive commissions of less than 57.5 percent, that often results in less money in the taxpayers' pocket and improved balance sheets for telephone vendors.

Some program critics, unaware or in spite of the regulations and controls under which the Inmate Call Home Program operates, object to what they consider exorbitant rates, which average 16 cents per minute across the state.

They believe the system should charge rates more in line with residential rates. However, none has recommended that inmates be assessed the monthly phone service fees or any equivalent charges paid by residential customers.

Other critics believe that the state should forego any commissions, and transfer to the taxpayers all costs borne by the Inmate Benefit Fund described below.

That debate has provided the niche in recent years for the creation of phone companies specifically designed to serve inmate families by circumventing prison rules and public safety.

Known as "resellers," they operate no equipment or systems of their own. Instead, they go into a community near a prison and buy a block of local telephone numbers.

They then re-sell these numbers to inmate families. They explain to the families that when inmates call these local numbers, the calls will be forwarded to the recipient's home phones – oftentimes hundreds of miles away – over systems that charge rates far lower than those charged by MCI.

The prison community addresses assigned to these resold local numbers may or may not even exist, but one thing is for sure: they are not the residence of the call recipient.

There is no communications platform today that guarantees the detection of all third-party transfers, especially those using digital switches. As a result, the reselling process thwarts major portions of the security system designed to protect the prison system and New Yorkers in general. That's because as a matter of basic security, the Department

Phone commissions earmarked for inmate, family programs

Since 1987, two years after the statewide inmate telephone program began, the Governor and the Legislature have required that all commissions be placed in and dispensed from a special account: the Family Benefit Fund (FBF).

That ensures that, since the funds came from inmate-related sources, they could identify these dollars and budget them each year specifically for programs serving inmates or their families.

Of the \$23.4 million in commissions anticipated this fiscal year, the state budget allocates \$17.6 million for medical care, including funding for the state's AIDS Institute, AIDS pharmaceuticals, staff training and related programs. While those are certainly legitimate state expenditures, the fact they are made from the FBF reduces the taxpayers' burden.

Commissions on the phone program pay \$330,000 annually for operation and maintenance of phone equipment – a cost that excludes the staff hours and equipment devoted to interface the system with the Department's mainframe, the cost of counselors maintaining individual inmate phone registries, the staff time to monitor inmate phone calls and the salaries, expenses and resources of investigators on the federal, state and local law enforcement level probing allegations of misuse of the system or its use in criminal activities.

The existence of the FBF also allows the state budget to address a second area: financing some inmate privileges for which taxpayers and legislators have expressed an unwillingness to spend tax dollars. If not for the FBF, some legislators have said, these programs would be dropped from the budget before they would support funding them with tax dollars.



Inmates with their children at Taconic.

- Cable TV, wherein the fund pays for basic cable service but inmates themselves must pay if they want premium channels. "Sex channels" are not allowed under any circumstances. (\$231,000 from the FBF)
- Free bus service, that transported 26,094 visitors from New York City and upstate cities to various prisons last year. (\$809,540)
- The Family Reunion Program, which allowed 17,188 relatives to spend a two-day period last year with inmates inside the secure perimeter at 16 prisons accommodating 18 facilities. (\$414,000)
- Nursery and family development programs at Bedford Hills and Taconic that, among other things, last year saw 67 new mothers reside with their infants up to age 18 months. (\$1.1 million)
- Medical parole, allowing 279 terminally ill inmates to earn release since 1992. (\$81,000) ☎

needs to know that the telephone number dialed actually matches the location where the call is completed.

The profits these companies receive from inmate families should properly be collected under the state contract with MCI. After all, MCI competitively bid and was properly awarded a state contract to be the exclusive provider of the phone system and the necessary security enhancements.

Resellers are therefore pocketing commissions that should rightfully flow from MCI to state taxpayers who finance this and other inmate programs.

These companies say they are willing to provide the Department with numbers they resell for the state's verification. It is the Department's position that the resellers have no right to provide any service whatsoever, and that taxpayers should not foot the bill to monitor, verify or reconcile these numbers. MCI, by comparison, is required to perform all those services under its contract.

The Department believes the resellers should be stopped, and has thus far been successful in its legal steps to prevent them from interfering with prison security, public safety and the MCI contract.

At the same time, inmates have been advised that, because usage of these numbers employs third-party dialing that violates Departmental policy, they are subject to disciplinary sanctions if found to be using such numbers.

The future: making the phone system fairer

To date, the Inmate Call Home Program contract has:

- Received the state Attorney General's approval as meeting all standards set for state contracts.
- Gained approval by the state Comptroller, both in the contract bidding process and by his audit of the program's performance and spending.
- Obtained approval for telephone rates from the Public Service Commission as fair and equitable.
- Documented before a federal judge that the system is appropriate while he denied the injunctive relief sought by one would-be reseller of phone numbers.

Rather than becoming complacent with that track record, the Department instead views it as one to build upon.

Commissioner Glenn S. Goord recognizes that the existing telephone rate structure, in an attempt to attain fairness, uses complex formulae that cause the eyes to glaze over.

The rate structure is laid out on a single page – but a single page that lists 126 separate rates based upon the time the call is placed and the distance it covers. It is the same confusion that often confronts the general public when deciding between competing telephone company offers.

Commissioner Goord believes rate structures both in and

Inmate Call Home Program rate change comparison <i>Data from 09/01/01 – 08/31/02</i>			
	Intralata calls	Interlata calls	Interstate calls
Number of calls	1,168,432.00	4,669,669.00	868,816.00
Number of minutes	21,084,644.00	86,878,767.00	16,234,652.00
Percent of all calls	17.00	70.00	13.00
Revenue generated	\$3,522,858.00	\$30,068,304.00	\$5,763,436.00
Pre-8/1/03 call cost¹	3.02	6.44	6.63
Post-8/1/03 call cost	6.04	6.04	6.04
Percent change	+100.00	-6.00	-9.00
¹ Estimates based upon average inmate calls of approximately 18+ minutes billed, like all phone companies, to the next-highest minute.			

out of prison should reflect fairness:

- Everyone using a phone should pay a fair share of the base cost to make the system work.
- Confusing rates structures should be eliminated wherever possible in favor of flat rates.
- Callers should have a pretty good idea when they pick up the phone as to what the call will cost them.

Effective August 1, 2003, the Department implemented revenue-neutral changes that make charges clearer and allow for easy estimation of the cost of each call:

- Picking up any of the Call Home phone handsets to make a call will cost a \$3 connect fee. That raises the interlata rate from \$1.58 to the \$3 already charged for all other calls.
- Calls will cost a flat 16 cents per minute, raising intralata calls from nine cents and reducing the average interlata and interstate by two and three cents respectively.

Enacting fairness in the rate structure increases the cost of local calls. But here, time and distance do matter in balancing the realities of the location of the state's prisons:

- Families of that 17 percent of inmates incarcerated closest to home will see fairness increase the cost of their phone calls. But they can more easily enjoy face-to-face visits with their incarcerated loved ones who are housed near them.
- Families of the 83 percent of inmates housed further from home – those who must travel the greatest distance to visit loved ones – will see fairness reduce their phone costs.

While fostering inmate family ties remains a high priority for the Department, its mission remains the same: safeguarding its employees and the general public, while providing constitutional incarceration and programs for inmates.

All of these goals are advanced by preventing safety and security disruption by resellers, and by making phone rates more equitable. ☎

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Implementation of Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

CC Docket No. 96-128

AFFIDAVIT OF ROBERT E. KOBERGER

STATE OF NEW YORK }
 } SS.:
COUNTY OF ALBANY }

ROBERT E. KOBERGER, being duly sworn, deposes and says:

1. I am employed by the New York State Department of Correctional Services (DOCS) as Assistant Director of Management Information Services. As such, I am responsible for the operation of DOCS data processing and communications.

2. I submit this affidavit based on personal knowledge and upon information provided to me by staff gleaned from DOCS' records in opposition to the Wright Petition. In connection with this matter, I have reviewed the affidavit of Douglas A. Dawson, sworn to on October 29, 2003, (the Dawson affidavit) and the Wright Petition.

**BACKGROUND
DOCS' INMATE CALL HOME PROGRAM**

3. The Inmate Call Home Program began in 1985 at Sing Sing Correctional Facility. At that time, the New York Telephone Company, Public Service Division, installed approximately 50 coinless telephones on walls in cell blocks and dormitory living areas. Officers

placed collect only calls to the inmates friends and families anywhere in the continental United States and, when accepted, handed the telephone to the inmate. Since that time, DOCS, in cooperation with various independent telephone companies, has installed collect call only, coinless telephones in every correctional facility under its authority. Today, DOCS operates 71 correctional facilities throughout the State of New York, including the Willard Drug Treatment Campus, housing approximately 65,000 inmates. These facilities vary in size, structure and purpose. DOCS operates one Drug Treatment campus, three correctional camps, several work release facilities, and a number of minimum, medium and maximum security facilities. These facilities presently house between 86 and 2,895 inmates. Attached hereto is the Daily Population Capacity Report for March 7, 2004.

4. An inmate telephone system is very different from a residential telephone. In a prison, we have devices that are closer to a public pay telephone than a residential telephone. Therefore, we need to establish a contractual relationship with a provider to install and maintain service for which the provider is paid by the revenue generated from the completed phone calls. The most important fact is that a vendor is given the exclusive right to carry all telephone traffic placed by DOCS' inmates in return for providing the service. In return the vendor supplies call processing equipment, computer interfaces with call processing and department systems, handsets, communications lines, call recording equipment, maintenance on all the equipment/services and commissions.

6. In constructing our inmate telephone system, DOCS had to balance the desire to provide access to an inmate's friends and family with the need to protect the public from fraud and abuse. The DOCS inmate telephone system was constructed to best meet these competing factors. No factor in the service was specified without careful thought and deliberation. In

addition to deciding how an inmate would dial, there were many other factors that were considered in building this program. These factors include the ration of inmates to telephone, the location of the telephones, the type of telephone, voice prompts, automated feedback to the inmate in the event a call is not connected, how the systems are integrated with DOCS' systems and procedures, call blocking, call monitoring, the hours of operation, the number of individuals allowed on the inmate's phone number registration list, call recording, the use of third party call detecting, etc.

7. The collect call only system provides both maximum access to telephone service for the inmate population, and the security controls sought by DOCS. The possibility for harassment is reduced by the simple fact that collect call only service gives the recipient of a call the option to refuse the call. Furthermore, after multiple refused calls, the system can prevent a further attempt, thus limiting unwanted or harassing calls. In addition, the collect call only system does not charge anyone if the call is not accepted.

8. After examining various options, DOCS determined that the single provider collect call only system was the best suited to meet DOCS' needs.

9. The telephone system itself consists of some 3,335 collect call-only telephones, some 150 high capacity T-1 facilities dedicated to inmate telephone traffic, and a call registry including 1,331,674 telephone numbers, about one-third of which are presently active. DOCS' inmates complete approximately 500,000 calls per month with an average length of 19 minutes per call, totaling roughly 9.5 million minutes. In addition, DOCS' inmates attempt approximately 2 million additional calls each month that are not completed. For each non-completed call, the inmate is given a voice response reason of denial and each call record is

marked with the call denial reason. DOCS' counselors have access to these records to assist the inmate with any concerns.

10. DOCS' inmates completed 6,706,916 calls during 2003. Of those calls completed by DOCS' inmates during 2003, 13% were interstate calls. The overwhelming majority of calls, 87%, were intrastate local and long distance calls terminating inside New York State.

DAWSON AFFIDAVIT

11. The Dawson affidavit is based on a number of unfounded assumptions and fails to include critical details. Based upon my review of the Dawson affidavit, there are number of factors that were not considered that may result in significantly higher costs than those Mr. Dawson predicts, and thus much smaller savings, if any, for the call recipient.

12. The Dawson affidavit is based upon an analysis of the inmate calling systems at three privately run prisons, resulting in the faulty premise that "the issue of inmate service competition is a generic question, and the conclusions drawn in [Dawson's] analysis would apply to all prison calling systems." Dawson Affidavit ¶ 3. The three prisons at issue have an average inmate capacity of 1,743 inmates. Dawson Affidavit ¶ 57. For a number of reasons, this same analysis will not apply to a prison system with numerous facilities and a wide-range in inmate capacities at those facilities.

13. Dawson assumes that all prison calling systems are comprised of the same four basic components including a switching platform, recording system, master control system and specialized software. Dawson Affidavit ¶ 14. While DOCS' system includes each of these components, it also includes an interface to DOCS' mainframe system. This interface provides the inmate telephone system with all of the relevant data about the inmate including his present facility and whether a disciplinary restriction is in place suspending his telephone privileges.

14. Dawson also attributes the evolution of prison telephone systems to the availability of new technology and to the expansion of prisoner rights. Dawson Affidavit ¶¶ 15-16. DOCS has always been at the forefront of providing inmate telephone service. For many years, DOCS staff manually performed many of the functions that DOCS has required to meet its security needs. Many of the technological advances associated with inmate calling services developed, at least in part, because DOCS demanded that our inmate telephone system have such controls. While advances in technology have broadened our capabilities and reduced the need to accomplish such tasks manually, the system has developed based on DOCS' needs. As the available technology has caught up with DOCS' requirements, DOCS has allowed its inmates additional calling opportunities.

15. The Dawson affidavit does not detail how DOCS' requirement, that the termination location of the telephone call be provided, is satisfied. This is an especially important requirement for DOCS' law enforcement branch, our Office of the Inspector General, as the information is often pertinent to investigations of criminal conduct involving an inmate conspiring with a member of the public.

16. Dawson addresses the problem of re-originating calls by only addressing 900 and 800 number blocking, but fails to address how this is controlled in a multiple provider environment. Dawson Affidavit ¶ 20. This is a serious problem for DOCS, and the practice is prohibited by DOCS' regulations restricting the use of call forwarding and third-party calling. DOCS requires the ability to detect, and the ability to disconnect, such calls. The introduction of one or more third-party IXC's with no contractual relationship will greatly enhance a call recipient's ability to forward a telephone call without DOCS' knowledge. This ability is a

serious security concern as call forwarding will in all likelihood conceal the identity of the called party.

17. Dawson addresses a required security feature called Personal Allowed Numbers (PAN) (§ 21), and how a prepaid debit system call to an approved number would, in theory, be processed (§ 32). DOCS allows each inmate to list up to 15 names and numbers on his telephone list. That inmate is restricted by the inmate telephone system to calling those numbers. In attempting to apply this restriction to a multiple IXC call recipient based prepaid system, a number of technological and cost issues are not detailed.

18. Dawson asserts, with no foundation, that the only difference between a collect call system and debit calling is “a very minor one related to call routing in the case of debit calling in order to verify that there are existing funds for the call -- a change that does not add cost to the call processing.” Dawson Affidavit § 33. When applied to the correctional environment as described below, it is clear that Dawson’s assertion is flawed.

19. In Dawson’s hypothetical system, the inmate is put on hold while the system determines that there are enough funds to pay for the call (§ 32). Dawson does not describe how the IXC system communicates with the inmate telephone system platform to determine if the call should be placed; to verify that the inmate is authorized by the call recipient to call the called number; and if the call is connected, that the call recipient has sufficient funds available to pay for a call of a particular length. Furthermore, such a system must be able to tell both the inmate and the call recipient how long they have to talk or why a call is not being connected. The technology to accomplish these tasks does not presently exist without significant change to the existing system. Furthermore, the cost of developing such a system is not included in Dawson’s analysis.

20. Many shortcomings in Dawson's hypothetical system become apparent when examined with respect to a prison system like that in New York State. Dawson envisions an inmate calling system where a number of IXC's establish service and compete for the business of the inmates and/or their families. This seems to make sense when taken from the perspective of a single prison with over 1,700 inmates. However, in the DOCS' system this business model simply falls apart.

21. First, there is little chance that even one IXC is going to compete for the business of the inmates at DOCS' work release and other small facilities with very little telephone traffic. Those inmates could be left with no service whatsoever.

22. Inmates at larger facilities would likely have more choices than inmates at smaller facilities. This could result in telephone calls from one facility costing substantially more than telephone calls from a facility that is less than one mile away.

23. Inmates committed to serve a sentence of imprisonment in DOCS may be transferred to any of its facilities. Transfers occur frequently during a period of incarceration based on changing security classification levels, programming needs, discipline, and a number of other factors. Because DOCS' facilities are so different, the cost of placing a telephone call could easily change with a transfer. Furthermore, assuming that the inmate's family member has established a prepaid account with an IXC offering service at one facility, that family member would not be able to use that prepaid account if the inmate is transferred to a facility where the particular IXC is not an option.

24. This raises a number of administrative issues, and associated costs. Under DOCS single provider system, an inmate's approved telephone number list and PIN are only active at the facility where the inmate is housed. That list is automatically transferred to the receiving

facility with the inmate and is usable at any prison location that the inmate is transferred to. At the same time, the inmate's PIN is deactivated at the sending facility. In a debit system in which the called party contracts with an IXC, information detailing which IXC is associated with each called number -- including which inmate or inmates are authorized by the called party to call that number -- must be communicated electronically to DOCS' Inmate Call Home Program platform so that calls can be properly routed. Also, under Dawson's theory, the inmate will be denied service at any facility where the family's choice of IXC is not available.

Dawson's affidavit suggests a misunderstanding of the complex security issues associated with operating an inmate calling system

25. The suggestion that further restrictions such as limiting debit fund payments to a small list of outside parties could prevent the creation of a commodity (Dawson Affidavit ¶ 37) demonstrates a fundamental misunderstanding of prison society. Dawson states that "it should also be kept in mind that a collect calling system can be abused as much as a debit calling system. Whatever value can be extorted from another inmate's debit account could also be extorted from his collect calling PIN." Dawson is simply wrong. DOCS prohibits inmates from possessing money. In a system where the inmate has a debit card, that inmate has money and that inmate can pay for someone else's calls. For example, through violence or threat of violence, one inmate can force a second inmate to add a telephone number to his list of approved numbers. Thereafter, the first inmate can place calls to his desired call recipient using that second inmate's PIN and debit account at the expense of the second inmate. With collect calling, there is no financial motive for such extortion because the called party pays for the call no matter whose PIN is used. Similarly, one inmate could voluntarily pay for a second inmate's calls to purchase drugs or other contraband from that inmate.

26. Dawson also suggests that the creation of a commodity through debit calling can be avoided if techniques for limiting the calling for each inmate “is combined with the inability to re-originate calls.” Dawson Affidavit ¶ 37. However, he does not explain how DOCS can prevent the re-origination of calls through the use of such a platform. He also fails to explain how DOCS can force an IXC with no contractual relationship with DOCS to impose restrictions on the re-origination of calls.

27. Similarly, when a problem with a given call or for that matter with a portion of the telephone system itself arises, problem resolution becomes much more complex. Rather than dealing with a single provider, and therefore the knowledge that the provider is the source of the problem, it is much more difficult to locate and fix the problem. This involves more personnel and more money. Thus, every problem increases the cost of the system.

28. Thus, whether or not some type of prepaid or debit calling is permitted, a single provider system is clearly the only means available for a prison system to truly maintain control over the inmate telephone system.

Competitive bidding

29. Dawson, relying upon the article by Justin Carver, concludes that the single-carrier inmate calling systems have resulted in a lack of competition and higher rates. However, both Dawson and Carver fail to see that there is competition in the bidding process to determine what provider will be awarded the contract. A properly constructed Request for Proposal (RFP) will have the same benefits as competitive choice -- including the lowering of rates, creation of new products and overall greater satisfaction amount telephone subscribers.

30. DOCS has effectively eliminated the potential for the bidding process to result in higher rates. Starting in 1991, each time DOCS has issued an RFP seeking bids for the Call

Home Program contract, the RFP has limited the telephone rates for the new contract to those of the tariff then in effect.¹ Thus, the responsive bidders were not permitted to increase the rates in order to offer a lower percentage but higher dollar value commission. This procurement method has essentially capped the amount that can be charged for inmate telephone service in DOCS' facilities while allowing DOCS to more effectively evaluate the responsive bids. Although the commission paid by the provider to DOCS has changed with each new contract term, the last time the calling rates were changed was in late 1994, when Value Added Communications (VAC) was the contract provider for the April 1, 1992 through March 31, 1996 contract.

31. Most recently, the Department amended its contract with the current contract provider, MCI, to change to a flat-rate structure. Under this new rate structure, all local, intrastate long distance and interstate long distance inmate direct dialed collect calls are billed at the same rate. The new rate structure resulted in a decrease to the rates charged for the calls placed by approximately 83% of the inmate population -- those who place either interstate or intrastate interLATA calls to their friends and families.

32. Dawson's assumption that technological advances have occurred that are sufficient to meet security and other penological needs, while at the same time providing competitive choices for inmate calling, is premature at best. It is based on a number of assumptions that are simply not true. He attempts to demonstrate how such a system could work, but he makes no attempt to show what happens if an issue is encountered at any point. He does not explain what happens if, in the family prepaid debit environment, the inmate is moved to a facility where the family's chosen provider does not provide service. He has failed to account for

¹ Prior to the 1991 RFP, local and long distance service was provided under separate contracts with the regional carriers at those carriers rates for operator assisted calling. Beginning in 1991 (for the April 1, 1992 through March 31, 1995 contract term), DOCS first entered into a contract combining local and long distance service for inmate calls.

the situation where the family does not have sufficient funds to pay for the call, or to pay for a call of the predetermined maximum length. He does not account for the possibility that the family will change providers, or establish accounts with multiple providers, or with one provider to receive calls from multiple inmates. Each of these variables add to the administrative expense, and Dawson did not address any of them.

COST ANALYSIS

33. The cost analysis with respect to providing the competitive system described by Dawson is suspect, at best. Dawson assumes that the expense of maintaining a prepaid debit system will be less than the billing costs and uncollectibles associated with collect calling. Dawson Affidavit ¶¶ 60-62. However, he fails to account for the cost of developing an entirely new debit system that is tied directly into an inmate telephone system. Such a system is far more complicated than today's prepaid calling cards which are commercially available to the general public. Such a system must not only verify that the call recipient has the funds to pay for the call, but also that the call is coming from the specified inmate (or one of several specified inmates). The debit system is also not self-contained. The IXC must communicate with the inmate telephone system platform to authorize the connection of the call.

34. Dawson's cost analysis is also premised on an average cost of \$400 per month for each T-1 circuit. Dawson Affidavit ¶ 64. Although he states that this is a conservatively high estimate based on the drastically varying costs across the U.S. Market, he also acknowledges that this rate would only be available "to a carrier purchasing a fairly large volume of capacity." Dawson Affidavit ¶ 64, note 38. In such a market, where multiple carriers compete to provide service for inmates to call their families and friends, it seems likely that most of the competing

carriers will be small IXC's who will pay more than the carriers with large volume discounts. With a single-carrier providing inmate telephone service to DOCS' 71 facilities, we currently have some 150 high capacity T-1 circuits dedicated to inmate telephone traffic.

35. Finally, the cost analysis fails to account for the expense of reconciling with each provider. DOCS keeps extensive records with respect to the calls placed on the Call Home Program system. Each month, those records are reconciled with MCI. Under Dawson's proposed system, DOCS would need to reconcile its records with those of the vendor providing the system platform, and the underlying provider would need to reconcile with each of the IXC's.

36. Because Dawson's cost analysis fails to account for a number of variables and new expenses, the assumption that costs will be reduced and rates will be lowered is not supported.

CONCLUSION

37. For these reasons, it is apparent that the Dawson affidavit fails to demonstrate that DOCS' security and other penological needs could be met with a multiple interconnecting carrier system. Furthermore, Dawson's analysis fails to demonstrate that such a system is economically feasible, or that it would result in lower rates.


ROBERT E. KOBERGER

Sworn to before me this
9th day of March, 2004


Notary Public

JASON D. EFFMAN
Notary Public, State of New York
No. 02EF6005242
Qualified in Rensselaer County
Commission Expires April 6, 2006

Attachment

Daily Population Capacity Report

March 7, 2004

LOC003F

NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES
DAILY POPULATION CAPACITY REPORT

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FACILITY BY SECURITY LEVEL	IN-HOUSE COUNTS										OUT-COUNTS				
	TOTAL	TOTAL	TOTAL	IN-HOUSE	GENERAL	S H U	INFIRMARY	TEMP	OUT-	OUT	EASE	HOSP	COURT	TO	SIDE
	IN/OUT	TOTAL	TEMP	TOTAL	CONFINEMENT	BEDS	INMATES	BEDS	INMATES	BEDS					
	COUNT	BEDS	BEDS	CAPAC	INMATES	BEDS	INMATES	BEDS	INMATES	BEDS					
MAXIMUM															
ATTICA	2185	2240	107	2240	2163	2087	2053	102	96	51	14	0	3	19	
AUBURN	1773	1818	86	1818	1759	1698	1666	83	75	37	18	0	3	11	
CLINTON	2895	2959	139	2959	2862	2825	2775	48	27	86	62	0	2	31	
COXSACKIE	1051	1074	48	1074	1037	962	949	32	22	80	66	0	1	13	
DOWNSTATE	1193	1234	74	1234	1164	1170	1118	36	14	28	12	0	0	49	
EASTERN	1022	1037	49	1037	1009	990	979	32	21	15	9	5	0	8	
ELMIRA	1838	1856	88	1856	1817	1768	1749	54	54	34	14	0	1	20	
FIVE POINTS	1423	1550	0	1550	1414	1422	1339	100	57	28	18	0	0	9	
GREAT MEADOW	1648	1694	81	1694	1628	1592	1545	69	67	33	16	0	4	16	
GREEN HAVEN	2085	2170	102	2170	2061	2080	2007	50	46	40	8	0	4	20	
SHAWANGUNK	561	575	23	575	552	539	526	24	20	12	6	4	1	4	
SING SING	1732	1804	50	1804	1705	1732	1665	30	18	42	22	0	4	23	
SOUTHPORT	865	948	75	948	851	150	115	788	733	10	3	5	0	9	
SULLIVAN	558	594	28	594	549	540	520	24	21	30	8	3	0	6	
UPSTATE GEN	303	312	0	312	300	300	295	0	0	12	5	0	0	3	
UPSTATE SHU	878	1200	0	1200	866	0	0	1200	866	0	0	0	0	12	
WALSH RMU	109	112	0	112	106	0	0	0	0	112	106	0	3	0	
WENDE	940	962	42	962	933	816	806	34	33	112	94	0	5	2	
SUB-TOTAL	23059	24139	992	24139	22756	20671	20105	2706	2170	762	481	17	31	255	
MEDIUM															
ADIRONDACK	565	566	126	566	557	556	552	0	0	5	0	0	0	8	
ALTONA	481	488	80	488	478	480	478	0	0	8	0	0	0	3	
ARTHURKILL	776	815	127	815	770	774	760	32	8	9	2	0	4	2	
ARTKL ASACTC	171	180	30	180	171	180	171	0	0	0	0	0	0	0	
BARE HILL	1705	1722	380	1722	1693	1680	1662	32	31	10	0	0	0	12	
BUTLER FDR	65	64	18	64	64	64	64	0	0	0	0	0	0	1	
BUTLER ASACTC	176	176	32	176	176	176	176	0	0	0	0	0	0	0	
C VNCNT GEN	959	1122	380	1122	947	1080	916	32	31	10	0	0	1	11	
CAYUG SHU200	176	200	0	200	176	0	0	200	176	0	0	0	0	0	
CAYUGA	871	882	140	882	865	840	831	32	31	10	3	0	0	6	
CHATY ASACTC	216	240	45	240	215	240	215	0	0	0	0	0	0	1	
COLLINS	988	1087	178	1087	986	1073	986	0	0	16	0	0	0	2	
COLLS SHU200	157	200	0	200	155	0	0	200	155	0	0	0	0	0	
EASTERN ANMX	171	180	30	180	170	180	170	0	0	0	0	0	0	1	
FISHKILL	1471	1612	497	1612	1461	1419	1353	84	49	109	59	0	4	6	
FRANKLIN	1709	1730	380	1730	1696	1680	1657	32	32	18	7	0	0	13	
FSHKL SHU200	181	200	0	200	178	0	0	200	178	0	0	0	1	2	
G HAVEN ANMX	52	60	10	60	51	60	51	0	0	0	0	0	1	0	
GOVERNEUR	866	882	140	882	853	840	826	32	27	10	0	0	1	12	
GOVNR SHU200	174	200	0	200	174	0	0	200	174	0	0	0	0	0	

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FACILITY BY SECURITY LEVEL	IN-HOUSE COUNTS										OUT-COUNTS				
	TOTAL	TOTAL	TOTAL	IN-HOUSE	GENERAL	S H U	INFIRMARY	TEMP	OUT-	OUT	EASE	HOSP	COURT	TO	SIDE
	IN/OUT	TOTAL	TEMP	TOTAL	CONFINEMENT	BEDS	INMATES	BEDS	INMATES	BEDS					
	COUNT	BEDS	BEDS	CAPAC	INMATES	BEDS	INMATES	BEDS	INMATES	BEDS					
GOWANDA	1736	1780	244	1780	1727	1716	1686	48	34	16	7	0	0	9	
GREEN SHU200	170	200	0	200	167	0	0	200	167	0	0	0	1	2	
GREENE	1594	1621	296	1621	1585	1596	1563	15	15	10	7	0	0	9	
GROVELAND	1235	1258	290	1258	1230	1242	1224	0	0	16	6	0	1	4	
HALE CREEK	401	480	100	480	400	480	400	0	0	0	0	0	0	1	
HUDSON	409	422	52	422	408	420	408	0	0	2	0	1	0	0	
LIVINGSTON	858	881	140	881	852	840	827	32	25	9	0	0	1	5	
MARCY	856	1002	260	1002	868	960	823	32	25	10	0	0	0	1	
MARCY ASACTC	186	200	0	200	185	200	185	0	0	0	0	0	0	0	
MARCY SHU200	171	200	0	200	171	0	0	200	171	0	0	0	0	0	
MID-ORANGE	728	740	87	740	725	728	720	0	0	12	5	0	2	1	
MIDST SHU200	164	200	0	200	164	0	0	200	164	0	0	0	0	0	
MIDSTATE	1289	1313	207	1313	1284	1231	1220	64	54	18	10	0	1	4	
MOHAWK	1301	1305	141	1305	1288	1257	1242	48	46	0	0	0	0	13	
MT. MCGREGOR	528	544	50	544	527	532	522	0	0	12	5	0	0	1	
OGDENSBURG	608	612	60	612	595	602	595	0	0	10	0	0	0	13	
ONEIDA	1188	1215	130	1215	1181	1155	1131	44	43	16	7	0	0	7	
ORLEANS	890	1032	290	1032	882	990	848	32	30	10	4	0	0	8	
ORLNS SHU200	177	200	0	200	177	0	0	200	177	0	0	0	0	0	
OTISVILLE	599	695	67	695	597	687	595	0	0	8	2	0	0	2	
RIVERVIEW	935	1122	380	1122	925	1080	899	32	21	10	5	0	0	10	
ULSTER	800	882	142	882	788	840	760	32	26	10	2	0	0	12	
WALLKILL	596	608	72	608	592	608	592	0	0	0	4	0	0	0	
WASHINGTON	871	882	140	882	863	840	833	32	30	10	0	0	1	7	
WASHNGTN ANX	191	208	0	208	191	208	191	0	0	0	0	0	0	0	
WATERTOWN	612	753	120	753	603	729	590	12	12	12	1	0	2	7	
WOODBORNE	796	925	36	925	793	902	784	14	9	9	0	0	0	3	
WYOMG ASACTC	94	100	10	100	94	100	94	0	0	0	0	0	0	0	
WYOMING	1584	1602	360	1602	1566	1560	1534	32	32	10	0	0	1	17	
WYOMING FDR	7	20	10	20	7	20	7	0	0	0	0	0	0	0	
SUB-TOTAL	33504	35608	6275	35608	33251	32845	31141	2345	1973	418	137	5	24	224	
MINIMUM (OTHER)															
BUTLER MIN	276	288	40	288	276	288	276	0	0	0	0	0	0	0	
FALLSBG ANMX	237	240	40	240	237	240	237	0	0	0	0	0	0	0	
HUDSON IT	51	65	2	65	51	65	51	0	0	0	0	0	0	0	
LAKEVIEW	893	992	126	992	866	950	849	32	15	10	2	0	0	27	
LKVV SHU200	169	200	0	200	169	0	0	200	169	0	0	0	0	0	
LYON MTN	161	162	1	162	161	162	161	0	0	0	0	0	0	0	
MIDSTATE MIN	157	171	0	171	157	171	157	0	0	0	0	0	0	0	
MONTEREY	232	300	0	300	230	300	230	0	0	0	0	0	0	2	
MORIAH	212	300	0	300	210	300	210	0	0	0	0	0	0	2	
QUEENS GEN	415	424	104	424	414	424	414	0	0	0	0	0	1	0	

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FACILITY BY SECURITY LEVEL	IN-HOUSE COUNTS										OUT-COUNTS				
	TOTAL	TOTAL	TEMP	IN-HOUSE	GENERAL	S H U	INFIRMARY	TEMP	OUT-	OUT	REL- SIDE TO	EASE HOSP COURT			
	IN/OUT	BEDS	BEDS	TOTAL	CONFINEMENT	BEDS	INMAT	BEDS	INMAT	REL					
	COUNT			CAPAC	INMATES										
SUMMIT	134	150	0	150	133	150	133	0	0	0	0	0	1		
SUMMIT GEN	84	100	0	100	83	100	83	0	0	0	0	0	1		
SUB-TOTAL	3021	3392	333	3392	2987	3150	2801	232	184	10	2	0	33		
MINIMUM (WK REL)															
BUFFALO	194	132	12	192	89	132	89	0	0	0	0	105	0		
EDGEcombe	353	413	158	632	274	413	274	0	0	0	0	78	0		
FISHKILL WR	81	76	3	100	35	76	35	0	0	0	0	46	0		
FULTON	229	431	50	568	147	431	147	0	0	0	0	82	0		
HUDSON WR	99	55	8	55	29	55	29	0	0	0	0	70	0		
LINCOLN	270	392	313	520	126	392	126	0	0	0	0	142	0		
ROCHESTER	86	70	0	111	33	70	33	0	0	0	0	53	0		
SUB-TOTAL	1312	1569	544	2178	733	1569	733	0	0	0	0	576	3		
MINIMUM (CAMPS)															
CAMP GABRIEL	327	336	29	336	327	336	327	0	0	0	0	0	0		
CAMP GEORGE	250	262	38	262	250	262	250	0	0	0	0	0	0		
CAMP PHARSAL	259	258	100	258	257	258	257	0	0	0	0	0	2		
MT MCGRE CMP	291	300	75	300	290	300	290	0	0	0	0	0	1		
SUB-TOTAL	1127	1156	242	1156	1124	1156	1124	0	0	0	0	0	3		
FEMALES															
ALBION FEM	1003	1162	142	1162	992	1098	947	48	45	16	0	0	11		
ALBION FM WR	65	58	18	58	37	58	37	0	0	0	0	28	0		
ALBION RELPS	2	10	2	10	2	10	2	0	0	0	0	0	0		
BAYVIEW	155	183	0	183	155	179	155	0	0	4	0	0	0		
BAYVIEW WR	183	140	74	140	47	140	47	0	0	0	0	136	0		
BEACON FEMAL	192	257	96	257	190	257	190	0	0	0	0	0	2		
BEDEFORD HILL	853	972	118	972	837	871	773	24	16	77	48	2	11		
LAKEVIEW FEM	89	120	20	120	89	120	89	0	0	0	0	0	0		
TAC F ASACTC	143	206	0	206	142	206	142	0	0	0	0	0	1		
TAC FM RELPS	1	14	7	14	1	14	1	0	0	0	0	0	0		
TACONIC FEM	204	221	50	221	203	221	203	0	0	0	0	0	1		
SUB-TOTAL	2890	3343	527	3343	2695	3174	2586	72	61	97	48	166	26		
TOTAL IN HOUSE	64913	69207	8913	69816	63546	62565	58490	5355	4388	1287	668				
GRAND TOTAL	64913	69207	8913	69816	63546	62565	58490	5355	4388	1287	668	764	544		

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FACILITY BY SECURITY LEVEL	IN-HOUSE COUNTS										OUT-COUNTS				
	TOTAL	TOTAL	TEMP	IN-HOUSE	GENERAL	S H U	INFIRMARY	TEMP	OUT-	OUT	REL- SIDE TO	EASE HOSP COURT			
	IN/OUT	BEDS	BEDS	TOTAL	CONFINEMENT	BEDS	INMAT	BEDS	INMAT	REL					
	COUNT			CAPAC	INMATES										
TEMP BEDS		-8913													
SHU BEDS		-5355													
INFIRM BEDS		-1287													
NET BEDS		53652													
% OF OCCUPANCY	120.9%			118.4%		109.0%									
DRUG TREATMENT CAMPUS															
WILLARD FDTC	49	104	0	104	49	104	49	0	0	0	0	0			
WILLARD MDTC	709	802	171	802	703	796	700	0	0	6	3	5			
SUB-TOTAL	758	906	171	906	752	900	749	0	0	6	3	1			

MR. G. RONALD COURINGTON
DIRECTOR - MIS

HAND DELIVER